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No. 93-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner

v.

GARY MEZZANATTO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT, GARY MEZZANATTO

MARK R. LIPPMAN
(Appointed by this Court)
8070 La Jolla Shores Drive, #437
La Jolla, CA 92037
(619) 455-6722
Counsel for Respondent

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QUESTION PRESENTED

This case presents the question of whether the government may use its superior bargaining position to extract waivers of the mandatory terms of Rule 410(4) of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure (hereafter "The Rules" or "the plea-statement rules"), rules designed to promote the plea-negotiation process.

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STATEMENT

I. BACKGROUND OF RESPONDENT

Respondent, who is now over forty years old, with a wife and three children, spent most of his life in the area of San Bernardino, Californ' Soon after graduating from high school, respondent served in the military and received special combat awards for his service in the Vietnam war. He remained in the naval reserves until 1978. After leaving the military, respondent worked as an electrician's assistant for approximately nine years. RT 258-260; JA 14-16.[1] Prior to his arrest on August 1, 1991, respondent had no record of criminal history. RT1 19.

II. PLEA-BARGAIN MEETING OF OCTOBER 17, 1991

On October 17, 1991, respondent, accompanied by his trial counsel,[2] met with the prosecuting attorney and two federal agents at the United States Atttorney's Office to engage in a plea-negotiation. RT 290-291, 337, 342, 365-366; JA 39-40, 74, 96-97. Before the meeting, respondent spent only five minutes with his attorney. RT 336-337; JA 74. The prosecution stated, among other things, that if respondent wanted to enter into a plea-discussion with the government, respondent would have to agree that whatever he said during the plea-discussion could be used to impeach any inconsistent testimony at trial, in the event the case proceeded that far. RT 367; JA 97. The meeting lasted approximately forty minutes. RT 370; JA 99-100.

At the beginning of the meeting, respondent said that he was afraid for his life and for the life of his family

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[1] "RT" refers to the reporter's transcripts of the trial proceedings. "RT1" denotes the reporter's transcripts of the post-trial proceedings. "CR" designates the district court's criminal docket sheet. "JA" refers to the Joint Appendix filed before this Court.

[2] At the meeting, respondent was represented by Merle N. Schneidewind, who was replaced by Richard Chier as trial counsel. CR 17, 18.

members. RT 371; JA 101. Pursuant to the government's questions, respondent offered information, implicating him in a drug conspiracy. He stated that he knew that both an individual named "Shuster" and their mutual friend, named "Uncle Bob," were involved in trafficking methamphetamine. Respondent also revealed that he first picked up a brown envelope (which contained methamphetamine) from Uncle Bob, and that this was the first time he had ever delivered a large quantity of methamphetamine. RT 290-294; JA 39-43. Respondent told the prosecutor and the federal agents that he had sold ounces of methamphetamine before and that he was acting as a broker for Shuster. RT 367-368; JA 97-98.

At various times during the meeting, respondent was accused of lying. RT 343-345, 349-351, 368-369; JA 80-81, 84-85, 98-99. At one point, respondent started to leave with his attorney, but then came back and "admitted" that he knew Shuster was manufacturing methamphetamine. RT 368; JA 98-99. After characterizing respondent's statements as "lies," the prosecutor terminated the plea-discussion. RT 345; JA 81.

At trial, respondent took the stand and his incriminating plea-statements were introduced into evidence to impeach his testimony.

SUMMARY OF ARGUMENT

At issue here is the proper interpretation of Rule 410 (4) of the Federal Rules of Evidence and Rule 11(e) (6) of the Federal Rules of Criminal Procedure. The parties agree that the plea-statement rules mean what they say: a plea-statement is not admissible at trial for affirmative or impeachment evidence. The government, however, believes that, despite their plain language, The Rules permit defendants to waive the mandatory terms of The Rules. Respondent now argues that The Justice Department's position is unsound for several reasons:

I. Through the plea-statement rules, Congress intended to create a per se rule of exclusion, barring the admis-

sibility of statements made during a plea-discussion. To effectuate this intent, Congress prefaced The Rules with a conspicuous limiting clause. "Except as otherwise provided in this rule. . ." Other than the two exceptions now listed in The Rules, no other exception, including the government's proposed impeachment or waiver exception, exists within the language or structure of The Rules.

Nor did Congress ever intend to allow the government to circumvent the prohibition of The Rules through waiver agreements. If Congress would have wanted it that way, it would have said so. Many rules and statutes, by contrast, contain clauses enabling parties to reach private agreements, whose terms differ from those of the particular rule or statute. On this score, the government's reliance upon the waiver analysis applicable to constitutional rights is misplaced. The ability of Congress to articulate its rules with precision and frequency sharply distinguishes rules from constitutional rights. The text of the Constitution is virtually unalterable, and for that reason, reading waivers into constitutional rights is essential to ensure the viability of the Constitution. The same is not true for the plea-statement rules, and thus there is no basis to imply waivers in them.

II. The legislative history of The Rules is consistent with their plain language. Time and again, the Justice Department lobbied before Congress for an impeachment exception to the general rule of exclusion. As petitioner has done here, advocates for the Justice Department argued the rationale of *Harris v. New York*, 401 U.S. 222 (1971), claiming that the admission of plea-statements for impeachment was necessary to prevent defendants from lying with impunity. But ultimately, the Justice Department failed to win the support of Congress.

III. Apart from the language and history of The Rules, the public policy interests involved support an absolute prohibition against a waiver or variance of The

Rules. Plea-negotiation is perhaps the most critical phase of the plea-bargain process. As such, the government's waiver scheme chokes off the plea-bargain process at its earliest stage. Further, the government's waiver practice gives rise to prosecutorial abuse—treating a plea-discussion as a full-fledged interrogation. More still, the Justice Department's claim that the waiver requirement is a needed "weapon" to supplement the prosecution's "arsenal" is overstated. Under the present system, there are many existing mechanisms, designed to discourage untruthful proffer statements.

IV. Finally, the government's proffer agreements constitute impermissible extra-judicial agreements. Drawing upon a very general theory of trial stipulations, the government here maintains that parties should be allowed to vary the mandatory terms of these or any rules of evidence. In making this argument, the government confuses the distinction between a forfeiture and a true waiver. Stipulations, untimely objections, invited errors and the like are all classed as forfeitures. The forfeiture analysis assumes an error has been committed, and the only outstanding question is whether an aggrieved party can effectively argue the error on review. Express waivers which are made before trial, like the Justice Department's proffer agreements, are completely different from forfeitures. In this case, the government must establish that the proffer agreement is, in the first instance, a permissible procedure. Respondent maintains it is not.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE RULES PRECLUDES READING INTO THE RULES AN IMPLIED WAIVER PROVISION.

The government argues that there is "no support in the text of Rules 11(e)(6) and 410" for barring defendants from waiving the plea-statement rules. Brief for U.S., at 8. Respondent disagrees, and maintains that Congress used specific textual devices to ensure that the terms of The Rules would not be varied or excepted.

A. Limiting Language.

As with a statute, this Court looks first to the text of a rule to determine its meaning. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987). Rules 11(e)(6) and 410 read, in relevant part: "*Except as otherwise provided in this rule*, evidence of [plea-statements] *is not*, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions. . ." (italics added). Congress included two exceptions within The Rules' exclusionary operation. They read: "However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

The language, structure and overall intent of The Rules could not be clearer. The Rules set forth a categorical rule of exclusion of all plea-statements, "*except as otherwise provided in this rule.*" (Italics added). The Rules then list the two exceptions to their general application. These exceptions are exclusive as defined by the limiting language of The Rules. *Crosby v. United States*, —— U.S. ——; 113 S.Ct. 748, 751 (1993).

In *Crosby*, for example, the Court held that same limiting language prevented the government from reading more waiver exceptions into the presence requirement under Rule 43 of the Rules of Criminal Procedure than were express in the terms of the rule. *United States v. Robinson*, 361 U.S. 220, 224-225 (1959) (same limiting language). As to the plea-statement rules, on their face they do not provide an impeachment or waiver exception to the general rule of exclusion.[3] This omission is fundamental; for the Justice Department must necessarily argue that an implied waiver exception exists within the language or structure of The Rules themselves, an interpretation contrary to their explicit limiting language.

B. Mandatory Nature of The Rules.

Respondent maintains that the plea-statement rules were written in absolute, mandatory terms. A mandatory rule, by definition, leaves no discretion to the parties; its terms are absolute and must be followed, unless the rule itself provides otherwise. Cf. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The government agrees that The Rules are mandatory in a limited sense: "Thus, the rules are 'mandatory' only in the sense that they preclude certain conduct by the government *in the absence of the defendant's agreement*." Brief for U.S., at 13; *id.* at 23. In essence, the government believes The Rules contain an implied waiver provision. But this interpretation finds no textual support; Congress knows how to promulgate and amend rules to enable parties to agree upon their own terms of admissibility.

To illustrate, compare § 1B1.8 of the Federal Sentencing Guidelines to Rules 11(e)(6) and 410. § 1B1.8 sets forth the rule of admissibility at a sentencing proceeding concerning statements made pursuant to a cooperation

[3] In fact, as later explained, Congress specifically rejected the Justice Department's proposed impeachment exception. *Infra* at 17-19.

agreement. In particular, this measure lays down a general rule of admissibility, but provides that the government may agree to alter this rule: "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used. . ." U.S.S.G. § 1B1.8(a).

Thus, in § 1B1.8, Congress contemplated parties reaching agreements, varying the general rule of admissibility. The absence of any smilar enabling clause in Rules 11(e)(6) and 410, the counterpart to § 1B1.8,[4] demonstrates that Congress never intended to allow parties to enter into private agreements to vary the rules of admissibility at a trial proceeding.[5] See, *Leatherman v. Tarrant County Narcotics Unit*, —— U.S. ——; 113 S.Ct. 1160, 1163 (1993) (expressio unius est exclusio alterius).

Stated differently, Congress knew how to provide the authority for the making of private (waiver) agreements, but chose not to promulgate or amend the plea-statement rules to accommodate such agreements. *United States v. Singer*, 380 U.S. 24, 36-37 (1964) ("the framers of the

[4] The Sentencing Commission was obviously sensitive to the interplay between the plea-statement rules and § 1B1.8. See, U.S.S.G. § 1B1.8, comm. n. 3 ("In the event no agreement is reached, use of information in a sentencing hearing is restricted by Rule 11(e)(6).").

[5] Rules 11(e)(6) and 410 appear to overlap § 1B1.8 as The Rules bar the admissibility of plea-statements "in any civil or criminal proceeding." A sentencing hearing is clearly a "criminal proceeding." However, § 1101(d)(3) of the Federal Rules of Evidence excludes the application of the rules of evidence at the sentencing stage of a criminal proceeding. For this and other reasons, the Court of Appeals in *United States v. Ruminer*, 786 F.2d 381, 385-387 (10th Cir. 1986) held that the plea-statement rules do not apply at the sentencing stage.

federal rules were aware of possible alternatives when they recommended the present rules to this Court . . . this Court promulgated the rules as recommended; and Congress can be deemed to have adopted it. . ."). Indeed, by contrast, there are numerous examples where Congress either directly, or by delegation, has enacted legislation or promulgated rules which enable parties to reach private agreements. E.g., Sup. Ct. Rule 26.2 ("In the absence of agreement. . ."); Fed. App. Rule Proc. 28 (h) ("unless the parties otherwise agree. . ."); Fed. App. Rule Proc. 30(b) ("In the absence of agreement. . ." [¶] "Unless the parties otherwise agree. . ."); Fed. App. Rule Proc. 34(d) (similar language) 5 U.S.C. § 579(d) ("unless the parties agree otherwise. . ."); 12 C.F.R. § 263.25(b) ("unless the parties agree otherwise. . ."); 22 U.S.C. § 4110(c)(3) (same language); 36 U.S.C. § 395(B) ("unless the parties to the proceeding mutually agree. . ."); 38 U.S.C. § 8502(b) ("unless the parties otherwise agree. . ."); 46 U.S.C. § 1707(c) ("unless the parties otherwise agree. . .").

Taking a slightly different approach, the government maintains that, by specifically drafting The Rules to preclude the admission of plea-statements "against the defendant," Congress intended to confer a private right on the defendant in the same way certain statutes confer personal rights upon individuals. On this analogy, the Justice Department believes that, just like these statutory rights, the plea-statement rules should be waivable. Brief of U.S., at 13-14. The government, however, misunderstands the meaning and purpose of this limiting clause.[6]

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[6] The government's position necessarily argues for a group of waivable mandatory rules. Indeed, the Justice Department's argument begs the question whether the prosecution may require waivers of the procedural protections of the alibi defense or of the insanity defense as a condition of a plea-negotiation. See, Fed. R. Crim. Proc. 12.1(f) ("Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not, in any civil or criminal proceeding, admissible *against the person* who gave notice of the intention.", italics added); Fed. R. Crim. Proc. 12.2(e) ("Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible *against the person* who gave notice of the intention.", italics added). The plain language of these rules clearly prohibits it. Why should the plea-statement rules be treated any differently? If anything, the limiting language of The Rules, "except as otherwise provided in this rule," provides additional support for prohibiting any variance of The Rules' mandatory procedures.

Again, if Congress wanted to allow parties to waive or vary the mandatory procedures of these or similar rules, it would have said so. Rule 17.1 of the Federal Rules of Criminal Procedure provides a good example. Rule 17.1 sets forth the general rule of non-admissibility for statements made by a defendant during a pre-trial conference. Congress, however, provided that the defendant may agree to vary this rule of exclusion, but only if certain procedures are followed. See, Fed. R. Crim. Proc. 17.1 ("No admissions made by the defendant or his attorney at the [pre-trial] conference shall be used *against the defendant, unless the admissions are reduced to writing and signed by the defendant and his attorney.*", italics added).

This wording, "against the defendant," was incorporated into The Rules to limit the rule of non-admissibility to the accused only. Third parties were not to come within its operation. Congress believed that this more limited application was consistent with The Rules' primary aim of creating an open and unrestrained atmosphere for plea-discussions:

> "Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use *for or against other persons* will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. . . ."

Notes of Advisory Committee on Proposed Rules, reprinted in 28 U.S.C.A. Rule 410, at 353, italics added. Hence, this limiting language does not define the nature of The Rules (personal right or mandatory rule), but instead operates as a limitation on their application. See,

Crosby v. United States, supra, 113 S.Ct. 748 (limiting language analysis). Viewed from this perspective, the plea-statement rules do not confer rights upon the defendant; nor do The Rules belong to the defendant any more than they belong to the government or to the courts.[7]

Thus, the government's reliance upon this language is wholly misplaced. This becomes even more apparent when we examine the language in a broader context. Rule 11(e), for instance, the provision controlling the plea-agreement procedure, refers to the defendant by name in several places.[8] Yet, these mandatory rules of procedure could hardly be described as personal and private rights. Rather, these provisions, in conjunction with the plea-statements rules and the other Rule 11 measures, are "the method chosen by Congress" to achieve certain objectives of the plea-bargain process. See, *United States v. Crook,* 526 F.2d 708, 710 (5th Cir. 1976); Notes of

[7] The public and institutional purpose of the plea-statement rules sharply distinguishes them from § 1983 and other civil rights actions. See, Brief for U.S. at 13-14. § 1983, for example, confers upon individuals a personal right to bring civil rights claims, and thus these actions are waivable. See, *Venegas v. Mitchell,* 495 U.S. 82, 88 (1990) ("A cause of action under § 1983 belongs 'to the injured individua[l],' (citation), and in at least some circumstances that individual's voluntary waiver of a § 1983 cause of action may be valid."). The Rules, on the other hand, are mandatory and self-executing rules of procedure.

[8] It is true that the other Rule 11 provisions are not rules of exclusion. But this difference is less important than their similarity. All Rule 11 provisions make up a single unitary and integrated scheme to ensure procedural fairness to the defendant throughout the course of the plea-bargain process. This continuum covers the plea-negotiation, the plea-agreement and the guilty-plea phases of the process. Thus, the plea-statement rules are no more waivable than are the other indispensable measures of the Rule 11 plea structure. See, *Brooklyn Bank v. O'Neil,* 423 U.S. 697, 711-712 (1944) (even Congressional rejection of anti-waiver bill still did not permit waivers of different provisions of the Fair Labors Standard Act because of the Act's integrated and unitary structure).

Advisory Committee (1983 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 363.[9]

C. Constitutional Rights v. Mandatory Rules.

The Justice Department maintains that the terms of the plea-statement rules are no more mandatory than those of constitutional rights. Brief for U.S., at 13. For this reason, the government claims, The Rules, like constitutional rights, should be waivable. Long ago, however, a defendant's constitutional rights were seen to have a distinct personal nature, existing strictly for the benefit of the defendant, and therefore waivable by him. *United States v. Gill,* 55 F.2d 399 (1931); *Barkman v. Sanford,* 162 F.2d 592 (5th Cir. 1947); see, *Smith v. United States,* 360 U.S. 1, n.4 (1958) (*Barkman* and *Gill* analysis followed).

In *Gill, supra,* 55 F.2d 399, the court considered whether the defendant could waive the Fifth Amendment provision that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The defendant argued that he could not because, unlike the language of other constitutional rights, the terms of the Grand Jury provision are mandatory. Quoting the analysis of earlier cases, the *Gill* court reasoned that the nature of constitutional rights, rather than their plain language, controls:

> " 'But it is insisted that if the accused may waive his right to a trial by jury, he cannot, by his consent, dispense with a presentment or indictment by a grand jury. The argument is based on the difference in the language of the two provisions. It is true that the

[9] This does not mean, of course, that a "variance from the procedures required [by the plea-statement rules]" constitutes per se reversible error. See, Fed. R. Crim. P. 11(h). But it is error, and if preserved by timely objection, must be reviewed for harmless error. See, *United States v. Olano,* —— U.S ——; 113 S.Ct. 1770, 1778 (1993).

> language in the provision securing trial by jury is expressive of an intention to confer a right, and the language in the other provision, with respect to a presentment or indictment, is prohibitory in the form of expression. But, nevertheless, both these provisions are classified under the title of "Rights and Privileges," and among the rights and privileges enumerated in the constitution. The form of expression in which the constitutional guaranty of the rights and privileges to which these two paragraphs relate are declared, does not alter or affect the nature of either."

Id. at 401.

The constitutional waiver analysis, however, does not apply to the plea-statement rules. Rules 11(e)(6) and 410, for example, were not promulgated principally for the defendant, although they do benefit him. Rather, the plea-statement rules have a larger and more independent public purpose—to promote and administrate the plea-negotiation process.[10] See, *United States v. Olano, supra*, 113 S.Ct. at 1782 (conc. opn., J. Kennedy) ("there are good reasons to suppose that Federal Rule of Criminal Procedure 24(c) is the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties."); cf. *United States v. Smith*, 360 U.S. 1, 10 (1958) ("Under our view of Rule 7(a) [of the Rules of Criminal Procedure], the United States Attorney did not have authority to file an information in this case and the waivers made by petitioner were not binding and did not confer power on the convicting court to hear the case."); *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992) (Speedy Trial Act non-waivable because of its public importance). Stated differently, The Rules are not so much "rights" as they are rules to "guarantee fair procedure." Appendix 9a.

[10] See, *United States v. Davis*, 617 F.2d 677, 683 (D.C. Cir. 1979); *Rachlin v. United States*, 723 F.2d 1373, 1376 (8th Cir. 1983).

In this case, Judge Sneed observed that the government's comparison of the plea-statement rules to constitutional rights was "a false equality." Appendix 9a. On this, he further explained:

> "Judicially created waivers of the latter are the result of an inescapable feature of the courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. Given the *precision with which these rules are generally phrased*, the comparative recentness of their promulgation, and the *relative ease with which they are amended*, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule."

Ibid., italics added.

Judge Sneed's analysis makes explicit what is an intuitively obvious distinction between constitutional rights and procedural rules. Whereas rules may be promulgated and amended to meet the needs of the moment, the text of the Constitution is essentially unalterable. Waivers are therefore one of the Court's interpretive means to give the Constitution continuing viability. Cf. *Opp Cotton Mills, Inc. v. Administration of the Wage, et al.*, 312 U.S. 126, 145 (1940) ("The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or impracticable."); see, *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1988) ("*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes."). In contrast, rules, even more so than statutes, are easily promulgated and amended, as the rule-making process is not subject to the Presidential veto power. Cf., *Touby v. United States*, —— U.S. ——; 111 S.Ct. 1752, 1757 (1991). Hence, in its rules, Con-

gress has the ability to articulate all that it wants, virtually anytime that it wants, through the use of precise contemporary legal language and through the ever-dynamic rule-making process.

A comparison between the judicially-created exclusionary rule and the plea-statement rules helps illustrate this point. The Justice Department and the Dissenting Opinion below maintain that the government's waiver policy is necessary to prevent the defendant from lying, from exercising what they call "the 'right' to lie." Pet. Cert., at 11-12; Appendix, 14a; Brief for U.S., at 11, 29. This argument proceeds on the rationale of *Harris v. New York*, 401 U.S. 222, 226 (1971); that to bar impeachment "allows defendants to pervert those rules 'into a license to use perjury by way of a defense,' (citation), and 'to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge.' (Citation.)." Brief for U.S., at 29. For important reasons, however, the Justice Department's waiver scheme may not serve as a surrogate for the *Harris* principle.

The rule of *Harris* is one of the exceptions to the exclusionary rule under *Miranda v. Arizona*, 384 U.S. 436 (1965). See, *United States v. Leon*, 468 U.S. 897, 910 (1984). The exclusionary rule itself is not authorized by the Constitution, but rather is " 'a judicially created remedy designed to safeguard Fourth [Fifth, and Sixth] Amendment rights generally through its deterrent effect. . .' " *Leon, supra*, 468 U.S. at 906, quoting from *United States v. Calandra*, 414 U.S. 338, 348 (1974). Because of its judicial nature, the exclusionary rule has developed by this Court's ongoing balance of two opposing values—the need to deter unlawful police practices and the competing interest to punish the guilty. *Id.* at 909-913.

The plea-statement rules, on the other hand, come from Congress and are meant to establish absolute procedures for the exclusion and admission of plea-statements. This distinction between the fluid nature of judicially-created

rules and the fixed character of legislative rules is critical. Once a statute or legislative rule becomes law, the balance of the various interests has already been struck. There is nothing more for the court or the parties to do but follow its terms. See, *West Virginia University Hospitals Inc. v. Casey, Governor of Pennsylvania*, 499 U.S. 83, 99 (1991).

Consider, for example, the difference between the Sixth Amendment right to a Speedy Trial and the Speedy Trial Act. In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court was asked to define specific time frames for determining a violation of the Sixth Amendment right to a Speedy Trial. The Court declined, stating:

> "The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered at trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right. . . .
>
> "But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be *less precise*."

Id. at 523, italics added.

Congress took this cue and enacted the Speedy Trial Act. 18 U.S.C. § 3161; see, *United States v. Taylor*, 487 U.S. 306, 341 n.12 (1987). This Act sets forth

precise time limits for trying criminal cases. Its time-provisions are mandatory and non-waivable. See, *United States v. Willis, supra*, 958 F.2d at 63.[11] In the same sense, The Rules are quite specific, and they are mandatory. They set forth the necessary conditions for a statement to come within the protections of The Rules. Fed. R. Crim. P. 11(e)(6)(D). They also provide two exceptions to the exclusionary principle. Beyond this, Congress did not provide for any other exceptions to, or waivers of, The Rules' application. See, *Crosby v. United States, supra*, 113 S.Ct. at 751 (Rule 43 of the Rules of Criminal Procedure sets forth list of waivers, none are implied).

II. THE HISTORY OF THE RULES MAKES CLEAR THAT CONGRESS DID NOT INTEND TO PERMIT THE GOVERNMENT TO SEEK WAIVERS OF THE RULES' PROTECTIONS.

So far, respondent has contended that the language of The Rules fails to support the government's argument in favor of an implied waiver exception. Respondent now maintains that the legislative history of The Rules confirms what their plain language makes clear.

By its legislative powers under Article I, section 1 of the United States Constitution, Congress enacted the Rules Enabling Act, 28 U.S.C. § 2072. This Act delegates most of the federal rule-making authority to the Supreme Court, see *Business Guides v. Chromatic Comm. Ent.*, 498 U.S. 533, 552 (1991), but ultimately all rules are reviewed and approved by Congress. 28 U.S.C. § 2074; *United States v. Abel*, 469 U.S. 45, 49 (1984). Rule 11 of the Federal Rules of Criminal Procedure comes from this Act, and its overall design is to ensure the fairness and adequacy of the plea and plea-bargain process. See, *McCarthy v. United States*, 394 U.S. 459, 465-466 (1969).

[11] Congress, however, contemplated waivers of the remedy of a violation of the Act. 18 U.S.C. § 3162(a)(2).

In 1975, Rule 410 and 11(e)(6) became a part of this effort. Cf. *Roadway Express, Inc. v. Piper et al.*, 447 U.S. 752, 760-761 (1979) (integrated provision of an Act must be read with common legislative purpose in mind to maintain uniform structure). Their primary objective "is to permit the unrestrained candor which produces effective plea discussions. . ." Notes of Conference Committee (1979 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 355; see, *United States v. Grant*, 622 F.2d 308, 312 (8th Cir. 1980); see Federal Rules of Criminal Procedure, Hearings Before the Committee on the Judiciary, United States Senate, 94th Congress, Sess. 152 (1975) (Statement of Wayne R. LaFave, reporter, Advisory Committee on Criminal Rules).

More than anything, the history of The Rules reveals a stark conflict between Congress and the Justice Department.[12] From the beginning, the Justice Department pressed hard for an impeachment exception to The Rules' exclusionary application. 23 Charles A. Wright & Kenneth W. Graham, Jr. Federal Practice and Procedure, (1977), § 5341, at 334-338, 345-346; 2 David W. Louisell & Christopher B. Mueller, Federal Evidence, § 184, at 509-518. Through its principal proponent, Senator John McClellan, the Justice Department began its campaign to create an impeachment exception to the general rule of exclusion for Rule 410.[13] This proposed ex-

[12] It appears that the government's campaign to provide for the use of plea-statements for impeachment was wholly instigated by the Justice Department. 23 Wright, Fed. Prac. & Proc., *supra*, § 5341, at 343 ("if the collected responses of U.S. Attorneys throughout the country that were submitted by the Department are any indication, the admissibility of statements made in connection with pleas and offer to plead was of comparatively little concern to most federal prosecutors").

[13] The exclusionary principle of the plea-statement rules was originally proposed in Rule 410 in 1969. See, 2 Louisell, Fed. Evid., *supra*, § 184, at 509. It was not until 1974, when it was proposed in Rule 11(e)(6). *Id.* § 184, at 513.

ception was meant to apply to a defendant's statements made on-the-record in connection with a plea or offer to plea, in the presence of defense counsel. The Rules' Advisory Committee, however, quickly rejected the Department's first attempt. Yet, as a compromise, the plea-statement rules were modified so that statements would be inadmissible against the defendant only. 23 Wright, Fed. Prac. & Proc., *supra*, § 534, at 336.

This, and other changes, however, did not satisfy the Justice Department. Next, Deputy Attorney General Kleindiest corresponded to the Chief Justice of the Supreme Court, claiming that the admission of plea-statements for impeachment fell within the rationale of *Harris v. New York*, *supra*, 401 U.S. 222, and that, without this exception, defendants would be permitted to lie with impunity. See, 23 Wright, Fed. Prac. & Proc., *supra*, § 5341, at 334-335, 337, n.9, n.18. Even so, the Advisory Committee recommended that no changes be made in The Rules, and the Supreme Court adopted the Committee's recommendation. *Id.* at 336-337.

The Justice Department continued the battle. At the House hearings, the Justice Department offered a "new proposal" to the recommended draft of Rule 410. Relying again upon the rationale of *Harris v. New York*, *supra*, 401 U.S. 222, the Department argued that a defendant is under a continuing obligation to testify truthfully, and therefore, the plea-statement rules should conform to this impeachment principle. Once again, the impeachment proposal was rejected. 23 Wright, Fed. Prac. & Proc., *supra*, § 5341, at 338-339, & n.26. Having no success with the House, the Justice Department took its case to the Senate hearings. In modified form, the Senate adopted the Department's impeachment exception. But the House Conference Committee refused to accept the Senate's version.

To delay the final decision on the matter, the Conference Committee agreed to postpone the effective date of

Rule 410, until the same issues could be resolved during the promulgation of Rule 11(e)(6). *Id.* at 340-341. At these House hearings, the Justice Department made similar arguments in favor of the impeachment proposal. But, as in the case of Rule 410, the Justice Department lost its bid for the impeachment exception to Rule 11 (e)(6). *Id.* at 344-346.[14] Given this history, it is hard to imagine that Congress would have ever wanted the government to do by indirection what Congress clearly prohibited by the plea-statement rules themselves. To the extent that the government still believes The Rules are inadequate, the Justice Department should once again turn to Congress, not to this Court, for assistance. *United States v. Mississippi Valley*, 364 U.S. 520, 565 (1960); *NLRB v. Health Care & Retirement Corp. of America*, —— U.S. ——; 114 S.Ct. 1778, 1780 (1994) (Court does not create exceptions to the plain language of statutory Acts, but Congress can and does).

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[14] The two exceptions to the per se rule of exclusion appear to be compromises to the Justice Department's efforts. Congress approved Rules 11(e)(6)(ii) and Rule 410(ii), which permit the use of a plea-statement for a perjury or false statement prosecution. This narrow exception posed a potentially serious impediment to open and candid plea discussion, and The Rules' Judiciary Committee knew it: "The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. . . ." See, Notes of Committee on the Judiciary (1975 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 353-354.

The second exception was proposed in 1979, and allows for the introduction of a plea-statement at trial to clarify a previously received plea-statement, which was introduced under circumstances not prohibited by The Rules. See, Notes of Conference Committee (1979 Amendment), reprinted at 18 U.S.C.A. Rule 11, at 356. This exception prevents the defendant from unfairly exploiting the application of The Rules by admitting evidence of only part of a plea-discussion. This exception is consistent with the broader objective of promoting fair procedure within the criminal justice system.

But the greatest irony of the government's present argument is that it goes against the very position the Justice Department originally took during the promulgation of The Rules. The Justice Department's several rejected proposals to allow plea-statements for impeachment at trial were never meant to apply to off-the-record plea discussions. Rather, the Justice Department's proposed impeachment exception was intended only for on-the-record, open plea-statements. In fact, during the Congressional hearings, representatives of the Department of Justice conceded that informal plea-discussions should not be used to impeach a defendant's trial testimony. See, Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States House of Representatives, 93rd Congress 2d Sess. at 44 (1975) (Statement of W. Vincent Rakestraw, Assistant Attorney General, Legislative Affairs); See also, *Id.* at 78 (Statement of Earl J. Silbert, D.C.). Thus, through its proffer agreements, the Justice Department now seeks to accomplish what it clearly dismissed out of hand during the promulgation of The Rules.

III. PUBLIC POLICY OF THE RULES PRECLUDES PERMITTING WAIVERS OF THE IMPEACHMENT PROTECTION.

A. Purpose of The Rules.

Plea-bargaining, of course, begins with off-the-record discussions between the defendant, his attorney and the prosecutor. In the federal system, prosecutors generally require a "proffer" [15] from the defendant. As one commentator explained, this stage of the plea-bargain process is especially critical and sensitive:

> "This stage is a delicate dance in which the witness must seek to persuade the government that what he has to offer is worth immunity or leniency while, at the same time, *not irretrievably incriminating himself.* These early negotiations may occur through use of a formal proffer or they may take place in a series of informal meetings between the witness and government agents or prosecutors."

italics added, G. Hughes, 45 Vanderbilt Law Review 1, 41 (1992), "Agreements for Cooperation in Criminal Cases."

Congress believed that this "delicate dance" could best be accommodated by striking a fine balance: excluding plea-statements offered for affirmative or impeachment evidence at trial on the one hand, yet permitting their use under different circumstances on the other. In this way, plea-bargaining would find a prominent, yet *managed,* role in the criminal justice system. That is what is meant by the "public policy" of The Rules. Under this analysis, the Court does not balance the general equities to reach what is regarded as a "just result." Cf. *United States v. Taylor, supra,* 487 U.S. at 338, n.9 (1987) ("Although we realize it would be tempting to wrap up the 'equities' in a single package and, with the best of intentions, effect what could be regarded as an essentially just result, we could not condone an approach that would violate the right of defendants and misapply the Speedy Trial Act in the hope that the errors would balance out in the end.").

Rather, the Court looks to the specific public interest contemplated by the legislature. See, *Brooklyn Bank v. O'Neil,* 324 U.S. 697, 705 (1944) ("the question of whether the statutory right may be waived depends upon

[15] As its name implies, a proffer describes the defendant's offer of information to the government. This offer is made by the defendant in the hope that he will ultimately receive some consideration for his information and cooperation. The term "proffer agreement," as used here, defines a more specific type of proffer discussion, requiring the defendant to waive the impeachment protection of The Rules. See, Larry D. Thompson & Phyllis B. Sumner, "Structuring Informal Immunity," 8 Criminal Justice 17, 19 (Spring 1993).

the intention of Congress manifested in the particular statute"); *Central Bank of Denver N.A. v. First Interstate Bank of Denver*, —— U.S. ——; 114 S.Ct. 1439, 1448 (1994) ("The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute."). The court below followed the same specific public policy analysis, and held: "Allowing a waiver of these rules would contravene and thwart the policy—efficient case resolution through plea bargaining—these rules were designed to effectuate." Appendix 7a, n.3.[16]

The Justice Department, nevertheless, offers its own rationale in favor of the waiver scheme. On one level, the government asserts, barring waivers of The Rules will have the effect of deterring plea-bargaining. This is so, the argument goes, because prosecutors will be unable to ensure the veracity of a defendant's plea-statements, and will thus have no incentive to engage in plea-negotiations. See, Petition for Rehearing with Suggestion for Rehearing en Banc, at 11-12; Brief for U.S. at 30. On this logic, the government argues that its proffer

[16] For this reason, the analysis of *United States v. Dortch*, 5 F.3d 1056 (7th Cir. 1993) is wide of the mark. There, the court upheld proffer agreements, because, in large part, they promote the "laudable policy encouraging defendants to tell the truth during both plea negotiations and subsequent trials." *Id.* at 1069. Yet, the principal aim of the plea-statement rules is to foster settlement negotiations, not to advance the fact-finding process. See, *United States v. Davis*, 617 F.2d 677, 683 (D.C. Cir. 1979) ("Congress, when it considered the provision, suggested that absent such a shield the possibility of self-incrimination would 'discourage defendants from being completely candid and open during plea negotiations . . .' (Citation)"); *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977) ("If we permit the facts concerning a plea bargain to be brought out in evidence, we will have silence on the part of every knowledgeable accused. Discussion will not be worth the price of the potential bargain.").

agreements promote plea-bargaining.[17] Petition for Rehearing, *supra*, at 10-11. The government, of course, is free to prosecute criminal cases as it sees fit. *Newton v. Rumery*, 480 U.S. 386, 396 (1986) ("Our decisions in those cases uniformly have recognized that courts normally must defer to prosecutorial decisions to whom to prosecute"). But its peculiar rationale for promoting plea-bargaining must remain its own; Congress has already rejected it. See, 23 Wright, Federal Practice and Procedure, *supra*, § 5341, at 337, n.18, 19; *Id.* § 5341, at 345; *United States v. Wood*, 879 F.2d 927, 936-937 (D.C. Cir. 1989) ("In considering these rules, Congress had debated and rejected proposals that statements made in connection with an offer to plead guilty be available for impeachment purposes.").

Examining this further, the government's waiver proposition throws in an added complication to the plea-bargain process. As Justice O'Connor put it, "The legitimacy of plea bargaining depends in large measure upon eliminating extraneous considerations from the process. (Citation)." *Newton v. Rumery, supra*, 480 U.S. at 400 (conc. opn., J. O'Connor); *United States v. Lawson*, 683 F.2d 688, 692 (2d Cir. 1982) ("Calculations as to use for impeachment purposes will clearly affect the discussions and impair the frank and open atmosphere Rules 410 and 11(e)(6) were designed to foster."). By transposing the rationale and holding of *Harris v. New York, supra*, 401 U.S. 222, onto its proffer agreements, the government has "created exactly the problems Congress sought to avoid." Cf. *Sedima, S.P.R.L. v. IMREX Co.*, 473 U.S. 479, 499 (1984).

[17] Common sense, alone, tells us that the waiver requirement acts as a brake, not as a facilitator, to the plea-bargain process. Undoubtedly, requiring a defendant to waive the impeachment protection of The Rules before he even begins discussing the case with the government would make any defendant think twice about engaging in a plea-negotiaton.

Seen from a different perspective, the government's waiver policy discourages the defendant from providing the most reliable proffer information. The very best information, information bearing the most indicia of reliability, is based upon a defendant's personal involvement and association with the criminal conduct under investigation. Thus, the most helpful proffer is necessarily that which incriminates or implicates the defendant in the suspected criminal activity. To allow the government to set up a scheme where a defendant must reveal his "best information" to obtain consideration for his cooperation, and where the prosecution may later exploit any inconsistencies in the proffer, at trial, undermines the entire cooperation effort. See, *infra* at 32-35. This much was pointed out by Judge Sneed in his opinion below:

> "For instance, prosecutors of those engaged in criminal conspiracies desire the fullest cooperation of those accused of participation therein. Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted. Rules 11(e)(6) and 410(4) aid in obtaining this cooperation. A lesser member of the conspiracy will more freely provide useful information to the prosecution if he knows that none of his statements in the plea bargaining session can be used against him."

Appendix, 6a; see, *Williamson v. United States*, —— U.S. ——; 62 U.S.L.W. 4639, 4642 (1994) ("Small fish in a big conspiracy often get shorter sentences than people who are running the whole show . . . especially if the small fish are willing to help the authorities catch the big ones . . .").

Under the waiver requirement, however, a defendant will have every incentive to reveal as little as possible about individuals and events which incriminate him. Assuming the government truly desires the best information about others involved in the crime, the proffer

agreement, in a very real sense, is a self-defeating proposition for the government's investigative interests and for the larger congressional and societal interests involved. See, Notes of Judiciary Committee (1975 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 353 (Rule 11(e) intended to encourage cooperation agreements).

And, even if this Court were to evaluate the government's waiver rule under a more generalized equity analysis, would the government's argument fare any better? Given the Justice Department's superior bargaining position—"[t]he coercive power of criminal process" [18]—is it fair to make a defendant wager his defense upon a throw of the dice with the government's "debriefing" [19] session, this without any assurance of a benefit in return? What a "price" to pay, observed Judge Sneed, "for the opportunity to enter into discussion that could have, but did not, lead to a plea bargain." Appendix, 9a. It is a poor bet indeed, a serious "roadblock" for many defendants who would otherwise freely engage in plea-bargaining. See, *United States v. Levy*, 578 F.2d 896, 901 (2d Cir. 1978); *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977) ("If we permit the facts concerning a plea bargain to be brought out in evidence, we will have silence on the part of every knowledgeable accused. Discussion will not be worth the price of the potential bargain.").

And, what is more, should defendants, like respondent, who agree to cooperate with the government, be required to jeopardize their defense in order to substantially assist the government in its investigations? Set against the extensive penalties compelled by the mandatory minimum sentencing laws and the Federal Sentencing Guideline,

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[18] *Newton v. Rumery*, *supra*, 480 U.S. at 400 (conc. opn., J. O'Connor).

[19] See, RT 358; JA 90.

the waiver requirement is inherently unfair and coercive. See, R.T. 340; J.A. 77 (ten-year mandatory minimum); *Newton v. Rumery, supra,* 480 U.S. at 401 (conc. opn., J. O'Connor) ("The nature of the criminal charges that are pending is also important, for the greater the charge, the greater the coercive effect."); cf. *United States v. Threw,* 861 F.2d 1046, 1050 (7th Cir. 1988) ("Hobson's choice"); Appendix 9a ("the government should not be given the ability to extract a waiver of these rules from a defendant who is in a weak bargaining position").

With the Sentencing Guidelines (which removes much of the sentencing discretion from the trial judge),[20] the prosecutor has more leverage over the defendant than ever. Under § 5k1.1, for instance, the government has virtually unreviewable discretion to reward defendants for their substantial assistance.[21] See, *Wade v. United States,* —— U.S. ——; 112 S.Ct. 1840 (1992). As Professor Hughes explains, "The lack of measurable standards for fulfillment of the promise confers on the government a tyrannical power to profess a continuing lack of satisfaction so that the cooperator feels goaded to ever greater efforts to please." See, 45 Vanderbilt Law Review, *supra,* at 37. This fact played against the enormous exposure defendants face under the current sentencing laws makes for a gross disparity in the relative bargaining position of the prosecutor and defendant. Given this uneven playing field, conditioning the mere opportunity to engage in plea-negotiations on a waiver of The Rules creates an "incredible dilemma," a dilemma which was unacceptable to Congress and one that should be found intolerable by this Court. Cf. *Green v. United States,* 355 U.S. 184, 193-194 (1957) (invalid waiver theory of double jeopardy protection).

[20] See, *Mistretta v. United States,* 488 U.S. 361, 363-367 (1988).

[21] Only after the defendant enters into a written cooperation-agreement does he have a potential claim of entitlement to a departure from the Guidelines under 5K1.1. See, *infra,* at 32, n.29.

Taking a different tack, the government attempts to sell its "limited" waiver agreement on the promise that it will discourage lying. See, Petition for Rehearing and Suggestion for Rehearing en Banc, at 2, 4. But, in fact, these proffer agreements have a much broader sweep.[22] Requiring waivers of the impeachment protection of The Rules would be harmful to some defendants who "may give inaccurate [plea-statements] due to confusion, mistake or faulty memory." See, *United States v. Dunnigan,* —— U.S. ——; 113 S.Ct. 1111, 1117 (1993); *James v. Illinois,* 493 U.S. 307, 314, n.4 (1989); *id.* at 320-322 (conc. opn., J. Stevens); 45 Vanderbilt Law Review, *supra* at 44, n.157 ("Obviously counsel should not advise the witness to lie in order to preserve conformity, but interviews may be extensive and the witness, through faulty memory or confusion, might create discrepancies. Counsel can make notes during interviews and go over them with the witness prior to his testimony.").[23] As to these defendants, the chill of the waiver requirement exacts a high price on the plea-bargain process.

For this reason, the case of *Newton v. Rumery, supra,* 480 U.S. 386 cuts against the government's waiver initiative. In *Rumery,* the Court considered the waivability of a civil suit under § 1983. In deciding against a per se rule of nonwaivability, the Court relied heavily upon

[22] In fact, under some proffer agreements, the government has used the plea-statements to impeach not only the defendant's testimony, but to impeach or rebut his entire defense. See, *United States v. Dortch et al., supra,* 5 F.3d at 1067-1068, n. 9; *Id.* at 1069 ("just as the defendant must choose whether to protect the proffer statements by not taking the stand, the defendant must choose whether to protect the proffer by carefully determining which lines of questioning to pursue with different witnesses"). The breadth of these proffer agreements goes beyond even the holding of *Harris v. New York, supra,* 440 U.S. 222. See, *James v. Illinois,* 493 U.S. 307, 314-315 (1989).

[23] In this case, respondent met with counsel for only five minutes before the proffer meeting. RT 336-337; JA 74.

the policy in favor of settlement. This, in fact, was the pivotal public interest supporting the release-agreement in *Rumery*:

> "The vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by § 1983 suits. No one suggests that all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. Counsel may be retained by the official, as well as the government entity. Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties. . ."

Id. at pp. 395-396.

Thus, what ran in favor of the government in *Rumery* is a serious liability for the Justice Department in this case. Compare, *United States v. Navarro-Botello,* 912 F.2d 318, 321-322 (9th Cir. 1990) (importance of settlement and finality of criminal cases supports waiver of sentencing rights);[24] see, Appendix 8a-9a. The government's proffer agreements undermine this statutory policy, discouraging many defendants from coming to the plea-bargain table—a result the criminal justice system can ill-afford. Plea-bargaining, now more than ever, is an imperative of our criminal justice system. "In 1985, the federal district courts disposed of 47,360 criminal cases. Of these, only 6,053, or about 12.8%, ended in trial. (Citation). As we have recognized, 'if every serious criminal charge were evaluated through a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.'. . ." *Newton v. Rumery, supra,* 480 U.S. at 396, n.6; see generally, T. Dunworth & C. Weisselberg,

[24] Further, 18 U.S.C. § 3742(a) is a discretionary, not a mandatory, statutory procedure: "A defendant *may* file a notice of appeal . . ." (italics added).

66 Southern California Law Review 99, "The Guidelines Experience" (1992). The plea-statement rules are a concentrated expression of this push for settlement of criminal cases. Cf. *Evans v. Jeff D.*, 475 U.S. 717, 733 (1985) ("a rule prohibiting the comprehensive negotiation of all out standing issues in a pending case might preclude settlement of a substantial number of cases"). All told, then, The Rules are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' (Citation)." Cf. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1977).

On a separate, but related, point, the government submits that the waiver rule serves an invaluable administrative function in policing the truthfulness of proffered information. More specifically, the Justice Department claims that "the absence of such a necessary check . . . may increase the number of instances in which the prosecutor unwittingly presents . . . false testimony" and that such unchecked information may lead law enforcement to act on bad information, causing the government to waste time and valuable resources. See, Brief of U.S., at 26-28, 28 n.8.

For one thing, the Justice Department undervalues the existing mechanisms to deter untruthful proffer statements. A prosecutor may advise a defendant that any untruthful statements given will destroy the defendant's chances of receiving consideration for his substantial assistance under U.S.S.G. § 5k1.1. See, 45 Vanderbilt Law Review, *supra,* at 38-39. For another, the prosecution may use untruthful plea-statements to enhance the defendant's sentence for obstruction of justice under U.S.S.G. § 3C1.1.[25] See, *United Sttaes v. Cox,* 985 F.2d 427,

[25] In addition, in all but the most extraordinary cases, a defendant who has been found to have obstructed justice will not be entitled to a two point reduction for acceptance of responsibility. See, U.S.S.G. § 3E1.1, comm. n. 4. Further, the government may argue to the sentencing court that the defendant should receive

431-432 (8th Cir. 1993). In fact, that is exactly what happened in this case. Respondent's sentence was enhanced by two points under the Guidelines (increasing respondent's prison term by approximately thirty-five months), for obseruction of justice.[26] This punitive measure has the advantage of being more tailored to solving the problem than the government's proposed impeachment proposition. After all, the government's objective is to penalize a defendant for knowingly providing false information, not to punish him for any and all discrepancies in his proffer statements. See, RT 367; JA 97 ("only if he lied and he took the stand"); *United States v. Dunnigan, supra*, 113 S.Ct. at 1117.[27]

B. The Government's Reliance Upon *Newton v. Rumery* is Misplaced.

Throughout its discussion, the Justice Department relies heavily upon the case of *Newton v. Rumery, supra,* 480 U.S. 386 to support its waiver theory. Brief for U.S. at 7, 22, 26 n.7, 32. Respondent believes that *Rumery*

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the high end of the guideline range for his untruthful proffer statements. See, U.S.S.G. § 1B1.4.

[26] The District Court made alternate findings of obstruction of justice: one for respondent's untruthful proffer statements, and the other for his untruthful trial testimony. RT1 26-27. The two point enhancement increased respondent's guideline status from 32 to 34 points. The differential between the midrange of both is approximately thirty-five months. *Id.* at 27.

[27] Finally, the Justice Department's claim that false information may lead prosecutors to unknowingly present false testimony is overstated. For example, in this case, early on in the plea-discussion, the prosecutor and agents knew that respondent's statements were untrue. RT 344-345, 349-351, 367-369; J.A. 80-81, 84-85, 97-99. And, as a precautionary measure, the government could request a defendant to submit to a polygraph examination while giving his proffer. See e.g., *United States v. Crisp*, 817 F.2d 256, 258 (4th Cir. 1987) (plea and cooperation agreement: "Your client further agrees to submit to a polygraph examination at the request of the United States Attorney.").

is both factually and conceptually distinguishable from the present case.

In *Newton v. Rumery, supra,* 480 U.S. 386, the Town of Newton charged Rumery with certain criminal offenses. After retaining an attorney, Rumery, pursuant to negotiations with the County Attorney, entered into a dismissal-release agreement. By the release, Rumery agreed to waive any claims he might have against the town under 42 U.S.C. § 1983 in exchange for the dismissal of the criminal charges against him. Later, Rumery filed a § 1983 action against the town, claiming the release-dismissal agreement was unenforceable. The Court held that such agreements were not per se invalid, reasoning that "[t]he benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in *consideration* of abandoning a civil suit that he may well have lost." *Id.* at 394, italics added. Thus, whereas Rumery gained a tangible benefit from his agreement, the same cannot be said of respondent under the present proffer agreement.[28]

Typical of its proffer agreements, the government's agreement here did not obligate the government to perform on any promise, nor did it impose any duty upon the government. Speaking for the lower court, Judge Sneed explained: "It should be noted that the government extracted the attempted waiver from Mezzanatto, not as part of a plea bargain, but simply as the price for the opportunity to enter into discussions that *could have,* but did not, lead to a plea bargain . . . ." Appendix 9a, italics added. Indeed, in the great majority of cases, the government enjoys unbridled discretion under the terms of its proffer agreement. *Wade v. United States,* —— U.S. ——; 112 S.Ct. 1840, 1844 (1992) ("It follows

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[28] Here, the government pushes the *Rumery* analysis one step further by conditioning a plea-negotiation, not the plea-bargain agreement itself, upon a waiver of The Rules' impeachment protections.

that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing. Nor would additional generalized allegations of an improper motive.").[29]

What respondent gained from his waiver agreement, (assuming that he had the authority to waive The Rules at all), was only an opportunity to enter into a plea-discussion—hardly consideration for a binding contract. Yet, the Justice Department now believes that it has a "right" to enforce its contract, a right, which it in fact, never possessed. Compare, Appendix, 15a.

C. Potential and Actual Abuses of the Proffer Agreement.

Respondent first argued to this Court that the government's waiver scheme invites prosecutorial abuse. Brief in Opposition, at 15-16. The Justice Department contends, however, that the "assumption that prosecutors will engage in abusive practices is contrary to this Court's teaching that 'tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty.' *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987)." Brief for U.S., at 32. Yet, at least with respect to proffer agreements, experience shows that prosecutors do in fact exploit their superior bargaining position. This case, the one the government chose for this

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[29] In *Wade v. United States, supra*, 112 S.Ct. at 1843, this Court explained that the government has "a power, not a duty" to file a motion for a downward departure under § 5k1.1. Since *Wade*, circuit courts have held that the government may bargain away its discretionary power under § 5k1.1 by entering into a written agreement obligating the government to make a substantial assistance motion if the defendant complies with the terms of the cooperation agreement. See, *United States v. Watson*, 988 F.2d 544, 552-553 (5th Cir. 1993); *United States v. Hernandez*, 996 F.2d 62, 65 (5th Cir. 1993); *United States v. Burcell*, 963 F.2d 976, 985 (7th Cir. 1992) (pre-*Wade*).

Court's review, is certainly representative. See, *Newton v. Rumery, supra*, 480 U.S. at 397 (1986) (facts of the particular case on review are illustrative of the broader practice).

With the government's understanding, respondent came to the plea-discussion meeting with the hope of receiving a reduced sentence in exchange for providing the government with helpful information *about other people involved in drug trafficking*. RT 319, 340, 365; JA 61, 77, 96. After respondent had answered the first few questions, (curiously none of the questions related to other suspects or potential defendants), the government determined that respondent was lying. RT 343-344, 368; JA 80, 98.

Rather than terminate the meeting at that point, however, the prosecutor and the two agents repeatedly confronted respondent with his untruthful statements to gather information against him. RT 344-345, 350, 368-369; JA 80-81, 85, 98-99. With each response, the government gained new incriminating information. In sum, the government created and exploited respondent's predicament. Having successfully caught respondent in an inconsistency, the government began using standard interrogation practices to build its case against him. Cf. *Miranda v. Arizona*, 384 U.S. 436, 455 (1965) ("This aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe.").

For example, at the meeting, the federal agents represented to respondent that " 'We have information, maybe, that you had handled some of the glassware.' " RT 373; JA 102. That was a lie. In fact, the agents had no information whatsoever that respondent touched the glassware. RT 373-374; JA 102; See, *Miranda, supra*, 384 U.S. at 450 ("These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty."). Further, during the plea-discussion,

the government repeatedly characterized respondent's statements as admissions. RT 292-295; JA 41-43.[30] Only when the government was through with respondent, when it had enough information to gut his entire defense, did the government terminate the "plea-discussion."[31]

And, since the government never questioned respondent about his knowledge of others involved in the conspiracy, presumably the government never intended to treat the meeting as a true "plea-discussion." In a word, respondent was "set-up." This exploitation subverts the basic purpose of The Rules: "Rule 11(e)(6) recognizes the existence and practice of plea bargaining and is a rule of encouragement. It should not be construed as a tempting rule with built-in deception. It should not be used to seduce confession or admission." See, *United States v. Herman,* 544 F.2d 791, 798 (5th Cir. 1977). By the government's own admission, the impeachment agreement is one of the "weapon[s] in the prosecutor's arsenal." Pet. Cert. at 13. But, as explained by the Fifth Circuit, "[I]t is inherently unfair for the government to engage in [plea-negotiation], only to use it as a *weapon* against the defendant when the negotiations fail." *United States v. Ross,* 493 F.2d 771, 775 (5th Cir. 1974) (italics added). Under the Justice Department's current waiver regime, plea-negotiation—an engagement meant for open and free exchange—has now become an abusive interrogation practice.

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[30] This was a point not lost on the trial court: "You are saying 'admitted' again." RT 295; JA 43.

[31] As a consequence of the proffer agreement, the government was able to successfully strip respondent of any potential entrapment defense. See, RT 384-387. And ultimately, the Justice Department's waiver agreement here sowed the seeds of prosecutorial vouching. See, Respondent's Brief in Opposition at 25-29. The overall effect of the proffer agreement was so powerful that it caused, in the words of the trial judge, "one of the quickest jurys (sic) I have ever had, and I have been at this for 28 years, since 1957." RT 472.

Ironically, while the government now grandstands respondent's untruthful statements, the truth is, both the government and respondent were playing " 'Liar's Poker.' " RT 375; JA 103. This very "cat-and-mouse" game, apparent here and certainly present in many proffer discussions, goes against everything Congress tried to accomplish. On this score, the words of the Eighth Circuit Court of Appeals could not be more apt, "Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk, that plea offers would be admissible evidence." *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976).

D. Governmental Overreaching.

The government argues that its waiver rule is "limited" and tailored to an important law enforcement objective. Petition for Rehearing, at 10-13. But this claim can hardly justify what is an otherwise unlawful practice. Ultimately, we have no real assurance that this "limited" waiver will remain just that. Long ago, this Court declared that unlawful encroachments come first in subtle forms, but their innocent appearance makes them no less dangerous: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635 (1885). A "limited" waiver today may, over time, grow into an oppressive prosecutorial apparatus.

In the end, the Justice Department simply leaves too many questions unanswered. If the government enjoys a free hand in obtaining waivers of this, and by necessary implication, of other mandatory rules, then is there no limit to waivers in general? If the plea-statement rules are waivable, what then is to prevent the government from freely moving its waiver scheme throughout the en-

tire Rule 11 structure?[32] *Brooklyn Bank et al. v. O'Neil, supra*, 324 U.S. at 710 (cannot selectively waive provisions of a uniform Act).[33] May the government use the proffer agreement as a means for extracting waivers of the defendants' many statutory and constitutional protections? Other than the mandatory words of its rules, Congress possesses no other vehicle to ensure the fair administration of criminal justice.

IV. THE GOVERNMENT'S PROFFER AGREEMENTS ARE IMPERMISSIBLE EXTRA-JUDICIAL AGREEMENTS TO WAIVE THE MANDATORY TERMS OF THE RULES.

The government argues that the lower court's waiver analysis creates a false and unworkable distinction. Under the present holding, the Justice Department maintains, a defendant may not affirmatively or expressly waive the plea-statement rules, yet he may forfeit them by not raising a timely trial objection. Brief for U.S., at 15-16. On this score, the Justice Department concludes, "No precedent of this Court supports such an anomalous doctrine." *Id.* at 16.

The government is simply wrong. Whether an express waiver of The Rules is itself valid goes to the threshold question of error in the first instance. If a defendant

[32] Indeed, permitting waivers of Rule 11(e)(6) necessarily implicates waivers of all Rule 11 provisions, as Rule 11 is a unitary and integrated Act. Cf., *Board of Education, New York City v. Harris*, 444 U.S. 130, 141-142 (1979); *Massachusetts Trustee v. United States*, 377 U.S. 235, 245 (1963) ("Viewing the 1946 Act as an integrated whole").

[33] See, Notes of Conference Committee, (1983 Amendment), reprinted in 18 U.S.C. Rule 11, at 363 ("it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this 'results in the creation of an atmosphere of *subtle coercion* that clearly contravenes the policy behind Rule 11' (Citation.)", (italics added).)

lawfully waives a right or rule, there is no error to begin with, and the forfeiture rule is not even implicated. See, *United States v. Olano, supra*, 113 S.Ct. at 1777 ("Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error.' "). The forfeiture analysis, on the other hand, assumes that an error has been committed, and the only remaining question is whether it rises to the level of a "plain error." This Court recently explained this distinction:

> "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rules 52(b) [of the Rules of Criminal Procedure]. Although in theory it could be argued that '[i]f the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review,' (Citation), this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the District Court proceedings, and if the defendant did not [validly] waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection."

Ibid.

Here, the government does not contend that respondent failed to raise a timely trial objection, nor does the government challenge the lower court's finding that the error was not harmless under Rule 52(a) of the Rules of Criminal Procedure. Appendix, 10a. Thus, under *Olano*, the only outstanding question is whether the government's waiver scheme is valid.

The government next argues that stipulations and other evidentiary agreements are qualitatively different from the general run of forfeitures. Brief for U.S. at 19-20. The government continues that, since parties customarily employ the "doctrine of stipulations" to alter the rules of evidence, the plea-statement rules should likewise be alterable by agreement. Brief for U.S. at 17-19. Here again,

the Justice Department misunderstands the principles of the waiver doctrine. To begin with, trial stipulations are, in fact, a species of "forfeitures." See. *United States v. Olano, supra,* 113 S.Ct. at 1771 (stipulated waiver of Rule 24(c) treated as forfeiture). Stipulations, invited errors, untimely objections and the like belong to this same class of trial waivers or "forfeitures." See, e.g., *All American Life and Casualty v. Oceanic Trade Alliance Council Intern'l,* 756 F.2d 474, 479-480 (6th Cir. 1985); *McMahon v. Eli Lilly and Co.,* 774 F.2d 830, 833, n.2 (7th Cir. 1985); *United States v. Williams,* 939 F.2d 721, 723 (9th Cir. 1991). The common thread running through all of them is that they fail to bring to the trial court's attention the potential error of the challenged procedure on review. See, Fed.R.Crim.P. 52(b) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the *attention of the court.*", italics added); see also, Fed.R.Evid. 103(d). Rules 51 and 52 of the Rules of Criminal Procedure set forth an important procedural scheme to ensure that a trial court has an opportunity to consider the claimed error of a particular procedure and to correct it, if necessary, to avoid errors on appeal. See. *United States v. Astling,* 733 F.2d 1446, 1459-1460 (11th Cir. 1984); *United States v. Fix,* 429 F.2d 619, 620 (9th Cir. 1970).

Thus, in a forfeiture context, a party, by her action or inaction during the litigation, is effectively precluded from raising on appellate review any potential error committed below. But this Court has never held that these forfeited errors are themselves proper; indeed, "[m]ere forfeiture, as opposed to waiver, does not extinguish any 'error' under Rule 52(b)." *United States v. Olano, supra,* 113 S.Ct. at 1777. Explained differently, the forfeiture rule limits, or may altogether defeat, a party's ability to seek a remedy for the error, but it does not negate the error itself.

That is why "extra-judicial" waivers, such as proffer agreements, are treated differently than trial waivers:

> "A contract to alter the rules of evidence could properly be considered a waiver. The Rules are silent on this question. Any consideration of the issue should distinguish between a contract made prior to litigation and stipulations entered into by parties while the case is in progress. The stipulation is clearly a procedural device under the control of the trial judge. It is made by parties represented by counsel when its consequences are clear, and in any event, the court has the power to relieve a party of the burden of the stipulation in appropriate cases. . . . [¶] An extra-judicial contract to alter the rules of evidence presents greater problems. . . ."

21 Wright, Fed. Prac. & Proc., *supra,* § 5039, at 206. Trial stipulations are less problematic because they involve a conscious strategic choice made by both parties covering issues arising immediately at trial. They also do not apprise the trial court of the potential error of the stipulated procedure. Thus, there is a vast difference between a stipulation employed as a trial expedient and the Justice Department's extra-judicial proffer agreement. A defendant enters into a proffer agreement not out of choice, but out of necessity. Pressured by his dire predicament, the defendant agrees well in advance of the trial to compromise the protections of the plea-statement rules. He does so not for any strategic reasons, i.e., not for his benefit or convenience during litigation. Rather, he bargains away the protection of The Rules in the uncertain hope that the government *may* give him consideration for his information.

Beyond this, the government's theory of stipulations implicates even larger doctrinal problems. This Court, for instance, may ask whether two or more parties can, for the moment or forever, agree to terms different from those set forth in a mandatory rule of evidence and procedure—to effectively supplant procedural and eviden-

tiary law with private agreements? May parties independently draft rules of evidence and procedure for themselves, even though Congress has already "occupied the field" with its own?

In passing, one commentator noted the broad implications of allowing parties to fashion their own rules: "Wigmore, however, seems to have overlooked the possibility that a legislature, when enacting a particular rule of evidence, aimed precisely to eliminate the authority of the parties to vary the rule established by the statute." See, 1 John Henry Wigmore, "Evidence In Trials at Common Law," (1983 rev. ed. Tillers), § 7a at 589; E. Cleary, 57 Nebraska Law Review 908, 910 (1978) (Congressional Supremacy in ruling-making). The short answer is that parties may never circumvent a legislative mandate by agreement or otherwise. To permit parties to do so undermines the time-honored "rule of law," see, *Marbury v. Madison*, 5 U.S. 137, 163 (1803); indeed, it breaks from the theory of the social compact. See, J. Locke, *The Second Treatise on Government*, Chap. VII, §89, (Cambridge Press 1967).

CONCLUSION

Respondent closes his argument as it began, with one basic principle. Congress makes the laws, and this must remain so despite the perceived needs of the Justice Department. The Justice Department maintains that theirs is a better approach, an approach repeatedly rejected by Congress, but one that has nevertheless continued in the guise of "proffer agreements." Here and elsewhere, the proffer agreement has been effectively used as a device to better manage the government's investigations and to further its prosecutorial goals. But, viewed on a broader scale, this "widespread practice" offends principles fundamental to the rule-making authority of Congress, fundamental to the fair administration of criminal justice.

On a more specific level, the government unduly inflates its claim that the decision below is both unfair and

unworkable. Specifically, the Justice Department maintains that the present holding gives defendants a "license to commit perjury." But this defendant (and presumably many others) paid dearly for his misstatements. Approximately thirty-five months were added to his sentence for obstruction of justice, hardly lying with impunity. This, and the other "weapons in the government's arsenal" are sufficient checks to deter untruthful proffer information. See, U.S.S.G. §§ 1B1.4, 3E1.1, comm. n.4; Pet. Cert. at 13.

Thus, for the aforementioned reasons, the Circuit Court's decision should be affirmed.

Respectfully submitted,

MARK R. LIPPMAN
(Appointed by this Court)
8070 La Jolla Shores Drive, #437
La Jolla, CA 92037
(619) 455-6722
Counsel for Respondent

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